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Letter Memorandum in Opposition to the Motion to Intervene (Hills Dev. Co.)

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WINNE, BANTA & RIZZI

COUNSELLORS AT LAW
25 East Salem Street
P.O. Box 647
Hackensack, New Jersey 07602
(201) 487-3800

TELECOPIER (201) 487-8529

BRUCE F. BANTA
PETER G. BANTA
JOSEPH A. RIZZI
ROBERT A. HETHERINGTON III
JOSEPH L. BASRALIAN
EDWARD H. MILLER, JR.
JOHN P. PAXTON
DONALD A. KLEIN
ROBERT M. JACOBS
T. THOMAS VAN DAM
PHILIP SCALO
EDWARD R. KOCH

HORACE F. BANTA
Of Counsel

WALTER G. WINNE
1889-1972

NEWFOUNDLAND, N.J. OFFICE
(201) 697-4020

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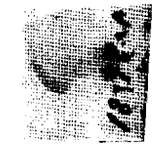

RULS - AD - 1981 - 30

January 26, 1981

Lawrence R. Olson
Somerset County Clerk
110 Administration Building
Somerville, New Jersey 08876

Re: Dobbs v. Township of Bedminster
(L-12502-80)

Dear Mr. Olson:

This brief letter memorandum is submitted in opposition to the motion by The Hills Development Company (hereinafter "Hills") to intervene in the above-referenced action, returnable January 30, 1981.

Hills has moved to intervene as of right under R. 4:33-1. This Rule, which is virtually identical to Fed. R. Civ. P. 24, prescribes three prerequisites to intervention as of right, none of which has been met in the present case by Hills:

(i) An interest relating to the property or transaction which is the subject of the action;

(ii) Being so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and

(iii) Inadequate representation of the applicant's interest by existing parties.

Hills has no interest relating to the property or transaction which is the subject of Plaintiff's action (i.e., the property specifically described in paragraph 1 of the First Count of Plaintiff's Complaint). The gravamen of the relief sought by Plaintiff in this action is "a rezoning of the tract of land for which Plaintiff is a contract purchaser to a regional

retail and commercial development district." Having and claiming no interest in the property so described in Plaintiff's Complaint, Hills has no "interest" within the meaning of R. 4:33-1 which would entitle it to intervene as of right.

Plaintiff's challenges to the zoning ordinance of the municipality are made strictly in the context of the alleged improper zoning of the aforementioned property, as to which Plaintiff is a contract purchaser and Hills has no interest. The fact that Plaintiff must challenge the zoning ordinance of the municipality because of its impact on a particular piece of property in which Plaintiff has an interest does not afford Hills or any other property owner in the municipality a sufficient interest within the meaning of R. 4:33-1 which would entitle it to become a defendant in this action. Such logic would open the floodgates to residents of a municipality becoming parties to any litigation in which the zoning ordinance was challenged. Cf. Fred Harvey, Inc. v. Mooney, 526 F. 2d 608 (7th Cir. 1975), wherein the Court held that, in a diversity suit brought by a restaurant lessee that sought a judgment declaring invalid a petition filed by the residents of an annexed area in which the restaurant was located to prohibit the lessee from selling alcoholic beverages, no resident of the adjoining dry area had any interest relating to the status of the restaurant tract and thus had no right to intervene in the suit.

In fact, Hills' predecessor (Allan Deane), in an action in which it had challenged certain provisions of the zoning ordinance of the very municipality involved in this case, successfully resisted intervention by others who also sought to challenge the zoning ordinance of the municipality. See Allan Deane Corporation, et al. v. Township of Bedminster, et al., 121 N.J. Super. 288 (App. Div. 1973), cause remanded 63 N.J. 591 (1973). In so holding, the Court noted that Allan Deane's action, albeit an attack upon the local zoning ordinance, was directed toward remedial relief to permit the use of Allan Deane's property for specific purposes. That is precisely the situation in this case.

Although necessarily couched in terms of a challenge to the zoning ordinance of the municipality, the gravamen of Plaintiff's Complaint and of the relief sought relates to the particular property as to which plaintiff is a contract purchaser. See, for example, the following paragraphs of Plaintiff's Complaint:

> "Plaintiff has requested that the defendant township give consideration to the provision for a regional retail and commercial development district or districts within

said township, said district or districts to be located in the area of the tract of land for which plaintiff is the contract purchaser, because such land, by virtue of its proximity to the aforesaid major arteries of traffic, is ideally situated above all other tracts within the defendant township for such uses." (Paragraph 8, First Count.)

"Under the provisions of the zoning ordinance adopted by defendant township, the tract of land for which plaintiff is a contract purchaser is zoned exclusively for residential purposes.

"Said tract lies in the immediate vicinity of major traffic arteries and public thoroughfares, and its highest and best suited use is for regional retail and commercial purposes.

"The present classification of plaintiff's property, prohibiting its use for regional, retail and commercial purposes, is arbitrary and unreasonable in that it bears no reasonable relation to the public health, safety and welfare of the defendant township and its inhabitants.

"For the reasons set forth hereinabove, said zoning ordinance, as applied to plaintiff's property, constitutes an improper and unlawful exercise of the police power delegated to the defendant township, depriving plaintiff of his property without just compensation or due process of law, and the said zoning ordinance is unconstitutional, null and void." (Paragraphs 2, 3, 4 and 5 of the Fourth Count.)

"The proximity of plaintiff's property to major traffic arteries and public thoroughfares renders it impossible to utilize said property for residential purposes as said property is presently zoned, because residential development near such traffic arteries and public thoroughfares is economically impractical, especially given the lot area required by the zoning ordinance adopted by defendant for the district in which plaintiff's property is located.

> "Such residential development is rendered further impracticable by virtue of the fact that soil conditions on plaintiff's property would require either the use of off-site sewerage treatment, which type of treatment is not possible for the residential development which would be required under the present zoning of plaintiff's property, or economically impractical on-site sewerage disposal systems.
>
> "As a direct result, the operation of a zoning ordinance adopted by defendant has so restricted the use of plaintiff's property and reduced its value so as to render said property unsuitable for any economically beneficial purpose, which constitutes a de facto confiscation of said property. For the reasons set forth hereinabove, said zoning ordinance is unconstitutional, null and void in that it deprives plaintiff of the lawful use of his property without just compensation or due process of law." (Paragraphs 2, 3, 4, and 5 of the Fifth Count.)

Moreover, the "reasons" for intervention set forth by Mr. Kerwin in his affidavit in support of intervention are totally insufficient under R. 4:33-1. The essence of Hills' rationale for intervention, it would appear, is that a determination favorable to Plaintiff's property would have an incidentally negative economic impact on Hills (an "interest" not protected under R. 4:33-1).

The remainder of Mr. Kerwin's affidavit is pure speculation, falling far short of the requirement of R. 4:33-1 that an applicant for intervention be so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest (assuming he has an interest within the meaning of R. 4:33-1). More particularly, if the Plaintiff were able to successfully challenge the zoning of its property, it certainly does not follow that the zoning of Hills' property would be necessarily affected.

Mr. Kerwin's affidavit is also misleading. Plaintiff does not seek in his Complaint that property owned by Hills be rezoned or that a rezoning of Plaintiff's property for commercial use would necessitate a rezoning of that part of the property owned by Hills which may be developed for commercial use. Rather the clear and indisputable thrust of Plaintiff's Complaint is that there is <u>inadequate</u> property zoned for commercial use in the municipality, <u>inadequate</u> especially in light of the rezoning

which has taken place to date through the efforts of Hills' predecessors and in light of the development being undertaken by Hills in the municipality. See, for example, the following paragraphs of Plaintiff's Complaint:

> "As the result of the aforesaid rezoning and the increased residential development to be permitted by it, the total population of defendant township will necessarily undergo an increase in the immediate future." (Paragraph 4, First Count)
>
> "The increased employment and economic growth which will result from development of the aforesaid corridors must be responded to by the defendant township by provision for increased services." (Paragraph 7, First Count.)
>
> "The uses and zoning changes proposed by plaintiff as aforesaid are designed to meet not only the current needs of nearby areas in and about defendant township which have been developed, but also the future needs of other nearby areas within defendant township which will be developed pursuant to the zoning ordinance adopted by defendant." (Paragraph 11, First Count)
>
> "The increase in population caused by the development authorized by defendant township in its zoning ordinance and by the presence of the major arteries of traffic described hereinabove will further result in a commensurate increase and expansion in the needs of such population for ancillary uses and services such as those proposed by plaintiff." (Paragraph 12, First Count.)
>
> "The zoning ordinance recently adopted by defendant township fails to enact a comprehensive zoning scheme, as it rezones only a small percentage of the total area of the defendant township, and fails to provide for the variety of retail, commercial and other uses which are necessary to serve the uses mandated by the rezoning effected by defendant." (Paragraph 14, First Count.)

> "Defendant township cannot rely upon the possible development of retail and commercial uses in neighboring municipalities within its region as a purported justification for its failure to provide for such uses in the zoning ordinance adopted by it." (Paragraph 15, First Count.)
>
> "The master plan and zoning ordinance adopted by defendant township have further failed to provide sufficient space in appropriate locations for a variety of, among other things, commercial and retail districts in order to meet the needs of defendant's present and prospective population, of the residents of the region in which defendant township is located, and of the citizens of the State as a whole, as mandated by the Municipal Land Use Law, N.J.S.A. 40:55D-2(g)." (Paragraph 6, Second Count)
>
> "As a developing municipality, defendant township has the obligation not only to make possible an appropriate variety and choice of housing, but also to make possible, within its boundaries, an adequate and broad variety of facilities which would serve the needs of defendant's present and prospective population and that of its immediate region." (Paragraph 2, Third Count)

The most telling argument against intervention by Hills is that any interest which Hills can claim is adequately represented by an existing party (the Township of Bedminster). As noted previously, Hills has no interest in the property specifically described in Plaintiff's Complaint. Hills' sole interest (although, for the reasons described above, inadequate under R. 4:33-1) is in preserving the present zoning of the municipality. This is an interest, however, which the Township of Bedminster and its very able counsel are presently representing in this litigation.

A classic situation where Courts have considered that the interest of an intervenor is adequately represented by existing parties is that situation where an existing party (and especially a governmental body) is charged by law with representing the interest of the intervenor. See 7A Wright & Miller, Federal Practice and Procedure § 1909 at 524:

> "...if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why his representation is not adequate. "

Contrary to the suggestion in Mr. Kerwin's affidavit, such existing governmental party need have no pecuniary interest in order for it to be able to adequately defend its zoning.

Analogously, see British Airways Bd. v. Port Authority of New York & New Jersey, 71 F.R.D. 583, 584-85 (S.D.N.Y. 1976), wherein the Court denied intervention to various towns, villages, community groups, environmental organizations, and residents located near John F. Kennedy International Airport in an action brought by a foreign airlines against the Port Authority seeking injunctive relief from the Authority's order prohibiting supersonic transports from operating at the airport. In so holding, the Court noted significantly as follows:

> "The applicants for intervention stumble on the third prong of the Rule 24 (a)(2) test, however, for there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it. Whether or not representation of an intervenor's interest by existing parties is to be considered inadequate hinges upon whether there has been a showing of (1) collusion; (2) adversity of interest; (3) possible nonfeasance; or (4) incompetence. United States v. International Business Machines Corp., 62 F.R.D. 530, 538 (S.D.N.Y. 1974). No such showing has been made here."

No such showing has been made in this case either. Further, see Deltona Corporation v. U.S., 14 E.R.C. 1810, 1812 (Ct. of Claims 1980), wherein the Court, in denying intervention to an environmental group on the ground that the intervenor's interest was adequately represented by an existing party, noted as follows:

> "...we are reluctant to entertain a presumption other than that the United States, through the Department of Justice, adequately represents the interests of the United States, which in this suit are aligned with the interest applicants assert. See Allard v. Frizzell, 536 F. 2d 1332, 1334. Wright and Miller, Section 1905."

The inappropriateness of Hills' intervention as of right is further evident from a review of Hills' proposed

answer. Hills proposes, for example, to make a series of denials of allegations relating strictly to Plaintiff's property, as to which property Hills has absolutely no interest. See, for example, Hills' proposed answers to paragraph 8 of the First Count of Plaintiff's Complaint, to paragraphs 3 through 5 of the Fourth Count of Plaintiff's Complaint and to paragraphs 2 through 5 of the Fifth Count of Plaintiff's Complaint. It is rather clear that Hills' interest in this matter is not limited to preserving the zoning of its particular tract but rather such interest extends to denying Plaintiff a rezoning of its property (presumably because of the incidental economic impact on Hills).

For all of the foregoing reasons, Hills should not be made a defendant with the full panoply of discovery devices available to it. If Hills has anything to contribute (other than protection of its self-interest), then the appropriate role would be as a friend of the Court. See Judge Wyzanski's comments in Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943), cited with approval in British Airways, supra, at 585:

> "It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

See also, Deltona, supra, at 1802:

> "...to the extent applicants may have an interest in the question before the court, it may be best advanced, as the trial judge determined, by amicus curiae status."

In sum, Hills totally fails to meet the requirements of R. 4:33-1 and is not entitled to intervene as of right. Should the Court, however, determine that Hills is entitled to intervene as of right - and Plaintiff would argue that this would be premature until Plaintiff has the opportunity, through discovery, to determine precisely what Hills' interest in this litigation is - then its intervention should be limited to issues as to which Hills can make a credible claim to an interest (e.g., the zoning

of the municipality as it may affect property owned by Hills and not the zoning of Plaintiff's property) and the availability of discovery devices to Hills should be proscribed or appropriately curtailed. See the Advisory Committee Note to the 1966 Amendment to Fed. R. Civ. P. 24(a):

> "An intervention of right under the amended rule may be subject to appropriate conditions or restructions responsive among other things to the requirements of efficient conduct of the proceedings.".

See also Smuck v. Hobson, 408 F. 2d. 175, 180 (D.C. Cir. 1969), wherein the Court stated that the nature of the intervenor's "interest" is relevant in deciding whether he should be permitted to contest all issues and whether he should enjoy all the prerogatives of a party litigant.

Very truly yours,

Joseph L. Basralian

JLB/kam
cc: McCarter & English, Esqs.
Brener, Wallack, Rosner & Hill, Esqs.

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